United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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To be argued by
DAVID S. GOULD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1157

UNITED STATES OF AMERICA,
Appellee,

—against—

WILLIAM H. JACKSON,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Preliminary Statement

Appellant, William H. Jackson, appeals from a judgment of conviction in the United States District Court for the Eastern District of New York (Bartels, *J.*), entered March 12, 1976 after a nonjury trial. Appellant was convicted of the misdemeanor of knowingly and wilfully obstructing and retarding the mail, by removing from the mail and opening without authorization a United States Treasury Check made payable to James Brown, in violation of 18 U.S.C. § 1701.

Appellant was sentenced to the custody of the Attorney General for a study pursuant to 18 U.S.C. § 4208(b). Execution of sentence has been stayed pending appeal and appellant is presently at large on bail.

On this appeal, appellant does not challenge the sufficiency of the evidence, but contends that the District

Court erred in remanding him for study, pursuant to 18 U.S.C. § 4208(b), following a conviction for violation of a statute which carried with it a maximum prison term of six months. It is his argument that § 4208(b) is unavailable except where the statutory penalty permits a term of imprisonment exceeding one year.

Statement of the Case[1]

A. Trial

The Government's principal witness at the trial was James Brown, a seventy-fi e year old male, who was the recipient of public assistance between 1971 and aproximately March of 1973. In 1971, Mr. Brown paid $25.00 per week as rent to live with Jackson and his family. The rent was paid to Jackson from the proceeds of Brown's welfare check which he received at the Jacksons' post office box. Later when the Jackson family moved to a new address, Brown moved with the family and arranged to have his welfare checks sent directly to the house where he and the Jacksons were now living.

In September 1972, Brown suffered a heart attack and was hospitalized until December 22, 1972. While Brown was hospitalized, Jackson would bring him the welfare checks which had been delivered to the Jackson home. Brown would then endorse these checks and give them to Jackson, who would cash them and deliver the money to Brown, who would then pay Jackson the rent from this money. This process eventually became too burdensome for Jackson, so he secured a letter, signed by both Brown and the welfare authorities, authorizing Jackson to endorse and cash Brown's checks directly. This letter was

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[1] Appellant has not challenged the sufficiency of the evidence. Therefore, the facts, as found by the District Court in its written decision, are summarized (Appendix C, pp. 2-6).

delivered and retained by the Staten Island Check Cashing Corp., which thereafter cashed the checks while Brown remained in the hospital.

After his release from the hospital in late December 1972, Brown returned to the Jackson home where he continued to reside as a boarder. In January 1973, the New York City authorities informed Mr. Brown he would stop receiving public assistance. Nevertheless, for some unexplained reason, Brown continued to receive these checks until approximately March 1973. During this time Brown was able to cash his own checks and he informed Jackson that the authority given to cash them was revoked. Jackson promised to destroy the letter of authorization, but because the letter had been lost by the check cashing service he never did so. In March 1973, after receiving his last welfare check, Mr. Brown disappeared from the Jackson home leaving all of his effects and other belongings; he did not leave any forwarding address.

Nine months after Mr. Brown disappeared from the Jackson home, United States Treasury Supplemental Security Income Payment Checks, each in the amount of $244.70, started arriving in United States Government envelopes which were addressed to Brown in care of the Jackson address. For approximately five months these checks, made payable to James Brown, 1012 Castleton Avenue, Staten Island, New York (Jackson's address), were so received. Included among these checks was a May 9, 1974 check which formed the basis of appellant's conviction. Mr. Brown did not know that he was going to receive these checks or that he was entitled to them.

Jackson took each of these envelopes from his mail box, opened them, signed the names James Brown and William Jackson on the back of the checks, cashed them and deposited the proceeds in his wife's bank account. Jackson spent the monies obtained from these checks for

his own personal use. Brown had not given Jackson authority to open the envelopes or to cash the checks. In fact, the May 9, 1974 check was cashed at a liquor store rather than at the check cashing service, where the letter of authorization had filed.

The district court found that Jackson had no authority to open the envelopes which were addressed to Brown and to cash the Treasury Checks, contained therein and that Jackson knew that he had no such authority. (Appendix C at 6). The court held, that "defendant William H. Jackson, obstructed and retarded the passage of mail by removing and opening an envelope containing Treasury Check No. 61,134,440, not addressed to him and by appropriating the contents for his own use, all without authority from the addressee. Defendant, William H. Jackson, did so obstruct and retard the passage of mail knowingly and wilfully." (*Id.* at 7).

B. Sentencing

At sentencing, because of appellant's admitted prior history of alcoholism and other aberrant behavior, the prosecutor requested the court to make inquiry of appellant in order to determine if he was then mentally and physically able to understand the nature of the proceedings.[2] Appellant stated that he was completely sober and his attorney advised the court, "I've spoken to Mr. Jackson this morning and it appears to me that he is fully in control of himself". (Sentencing Minutes, p. 3). Appellant's counsel, speaking on behalf of appellant, thereafter, pointed out that he had an extensive mental history and had, in fact, been institutionalized on several occasions.[3]

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[2] Appellant also testified in his own behalf at trial and a similar inquiry was requested and made. (Trial transcript p. 119).

[3] Counsel, however, was also careful to note, "I've had no problems in dealing with him as far as preparation of his trial and the trial of this case." (Sentencing Minutes, p. 5).

Counsel further stated that Jackson had problems remembering things and that he was often confused. (*Id.* at p. 5).

After appellant's counsel discoursed at length about mental problems, which she stated were caused by excessive alcoholism, the court responded as follows:

> "Well, I'll tell you what I am going to do: I'm going to send him away for study". (*Id.* at p. 5).

Appellant's counsel stated that she "wondered", if that was the best thing to do, but took no objection to the sentence (*Id.* at pp. 5-6). Finally, it should be noted that despite the court's apprehension about allowing appellant to remain on bail, due to his lengthy alcoholic history, the court ultimately permitted bail pending this appeal. (Sentencing Minutes, p. 8).

ARGUMENT

The trial court's sentence, remanding appellant to the custody of the Attorney General for a study pursuant to Title 18, U.S.C. § 4208(b), was proper and legal.

Appellant argues that 18, U.S.C. § 4208(b)[4] does not permit a sentencing court to remand a defendant to the custody of the Attorney General for study pursuant to its provisions in a case where the maximum penalty is one year or less in prison.[5] This argument is based upon a

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[4] This section has been changed to 18 U.S.C. § 4205(c), pursuant to the Parole Commission and Reorganization Act (P.L. 94-233, effective May 14, 1976).

[5] Title 18, United States Code, Section 4208 provides:

Fixing eligibility for parole at time of sentencing:

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defend-

[Footnote continued on following page]

ant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(b) If the Court desires more detailed information as the basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) thereof. The results of such study together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of this case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by Section 3651 of this title, or (2) affirm the sentence of imprisonment and commit the offender under any applicable provision of law. The term of sentence shall run from the day of the original commitment under this section.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made with the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole.

This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and his physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigations as it may deem necessary.

It shall be the duty of the various probation officers in government bureaus and agencies to furnish the board of parole with

[Footnote continued on following page]

contention that the language of § 4208(a) referring to "imprisonment for a term exceeding one year" is controlling with respect to § 4208(b). The Government contends, however, for the reasons set forth below, that a sentence pursuant to § 4208(b) is available in misdemeanor cases.

In the only Circuit that has squarely confronted the issue now before this Court, eight out of the nine Judges hearing the case, explicitly held that § 4208(b) is available when a sentence is imposed under statutes which provide for less than a one year term of imprisonment. *United States* v. *Lancer*, 508 F.2d 719 (3d Cir. *en banc*), *cert. denied*, 421 U.S. 989 (1975). In *Lancer*, as in this appeal, it was contended that § 4208(b) was available only in cases where the prison term imposable exceeds one year. This contention was similarly grounded in an argument that a proper construction of § 4208(b) necessarily includes incorporation of the § 4208(a) provision. The Court disagreed and stated:

> "The fact that Sub-section (b) is silent with respect to the length of sentence required before a study can be ordered is consistent with our view that the purpose for the study provisions bears little relationship to the term for which the defendant can be sentenced. The purpose of Subsection (b) was to assist the court in "making a sentence determination in a particularly difficult case." There is no basis for assuming that difficult sentencing decisions occur only when the permissible sentence exceeds one year. Compli-

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information concerning the prisoner, and, whenever not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case.

(d) The board of parole having jurisdiction of the parolee may promulgate rules and regulations for the supervision, discharge from supervision, or recommitment of paroled prisoners.

> cated factors, which a study by the Bureau of Prisons is designed to sort out, are just as likely to be present when the offense committed carries a maximum sentence of less than one year. We find no logic in a construction of the statute which would prohibit the district court from utilizing the study provisions of § 4208(b) and (c) where the term of the offender is less than one year. We therefore hold that the "one year" limitation of § 4208(a) was not intended by Congress to bar use of § 4208(b) and (c) after probation has been revoked on an offense carrying a maximum penalty, not exceeding one year imprisonment. *Id.* at 728.

Moreover, the *Lancer* Court also pointed out that applying the provisions of § 4208(a) to subsections (b) and (c) would bring § 4208 into direct conflict with 18 U.S.C. § 3653 and Rule 35 of the Federal Rules of Criminal Procedure. 508 F.2d, *supra*, at 729.

It is deemed important to note, as the *Lancer* case, *supra*, considered significant, that the one year provision of subsection (a) is not repeated in either subsection (b) or (c). Certainly, if the one year condition precedent was included in a general introductory paragraph, then the Government would of course, be hard pressed to argue that such requirement does not apply equally to all subsections of the statute. However, since the one year provision is included only in subsection (a), on the face of the statute its applicability would appear to be limited to that particular subsection.[6]

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[6] *But cf. Corey* v. *United States*, 375 U.S. 169, 173 n.13 (1963) (dictum). In *Corey*, the Court held that a defendant had the option to appeal a § 4208(b) sentence either after an initial sentence to a § 4208(b) study or after the final, post study sentence. In a footnote, the Court stated, in passing, that the provisions of § 4208(a) apply to subsections (b) and (c). However,

[Footnote continued on following page]

The legislative history of § 4208(b) reveals that the Congress designed the so-called "study and report" provisions to aid the sentencing court "in particularly complex cases" by providing it with a full study of the defendant (S. Rep. No. 2013, 1958 U.S. Cong. Adm. News 3892). This legislative purpose does not appear to discriminate according to the length of sentence imposable. The reason is clear: cases involving a possible sentence of more than one year are not necessarily more complex than cases involving a lesser possible term of imprisonment. Indeed, a defendant in such a case may be equally or perhaps even more in need of a particularized sentence. This is forcefully seen in the fact that even a misdemeanant is subject to a probationary period of up to five years. 18 U.S.C. § 3651. Certainly, in such a case it would be to the sentencing court's benefit, in an appropriate case, to have a study and report to enable it to structure a "personalized" probationary term. In fact, it may well be that a court, whose original inclination was to impose a prison term may, following receipt of the report, modify the sentence imposed.

Finally, the opportunities for judicial abuse of § 4208(b) do not seem to be greater with a six month sentence then with a sentence in excess of one year. It is well settled that a prisoner sentenced pursuant to 4208(b) can appeal either from the time the 4208(b) sentence is imposed or after the final sentence is imposed. *Corey* v. *United States*, 375 U.S. 169, 173 (1963). Indeed, if an appeal is taken immediately after the 4208(b) study

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the Court did not consider the effect of its broadly worded dictum on the "one year" provision. Indeed, the Court in *Corey* was dealing with the language concerning entry of a judgment of conviction in subsection (a) and not with the language concerning sentences of more than one year. It is interesting to note that in the *Lancer* case, decided twelve years after *Corey*, neither the majority nor the dissent cited to footnote 13 of the *Corey* case.

is ordered, it appears that a court cannot direct an immediate remand of defendant to the custody of the Attorney General *solely* because the court wishes to have the study commenced immediately. *Corey* v. *United States*, *supra* at 172; *Iler* v. *United States*, 433 F.2d 8, 9 (9th Cir. 1970). Therefore, if a misdemeanor defendant who has been sentenced to the maximum possible prison term believes that his immediate remand for study by the Attorney General has been for punitive or other illegitimate reasons, he may take an immediate appeal and this issue will not be moot by the time the appellate court hears the case.[7]

This appeal demonstrates a proper application of § 4208(b) to a misdemeanor case. It became evident throughout the trial and at the sentencing that appellant Jackson had a severe alcoholic problem. In addition, that problem appeared, at least to the district court, to have caused other mental problems which in turn led to the commission of the crime for which he was convicted as well as other similar criminal acts. Indeed, the day the trial was scheduled to commence, appellant failed to appear and counsel informed the court that appellant had had an automobile accident. The next day appellant admitted that he had not appeared in court because he was drunk. He also admitted having memory problems and that he passed out from time to time (Trial Transcript, pp. 116-17).[8] At sentencing, appellant's counsel pointed

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[7] Of course, a defendant could choose to surrender immediately for the § 4208(b) study and the trial court could thereafter impose final sentence, even while the appeal from the initial sentence is pending. See, *United States* v. *James*, 459 F.2d 443 (5th Cir.), *cert. denied*, 409 U.S. 872 (1972); *Howard* v. *United States*, 332 F.2d 82, 85 (5th Cir. 1964); see also, *Corey* v. *United States*, *supra*, 375 U.S. at 175 n. 15.

[8] It was determined, however, that appellant was not intoxicated and was able to understand the proceedings (Trial Transcript, p. 119).

out that there was a prior history of mental illness as well as an alcoholic problem (Sentencing Minutes, p. 5). Thereafter, the District Court, rather than immediately sentencing appellant to a possible six months incarceration, which would not have been unlikely given the background of appellant, ordered him to be committed for a study to guide the court in fashioning an appropriate sentence.[9]

In sum, it would appear from the face of § 4208(a) that the one year provision applies only to subsection (a). Since such a reading comports with common sense and a fair administration of justice, and has been so held by the only Circuit directly considering the issue. Accordingly, this Court should affirm the order of the District Court by holding that appellant was properly sentenced to a study pursuant to § 4208(b).

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[9] The court stated: "I think he's got to start immediately going to Alcoholic Anonymous or something like that, because his life is going to be ruined unless he is able to discard this horrible habit of resorting to alcoholism and escape from the daily problems that face him. In other words, it's like a disease, and he isn't doing anything about it" (Sentencing Minutes, p. 9). As this statement makes evident, the court was utilizing § 4208(b) for rehabilitation and not punishment.

In a recent case, *United States* v. *Torun*, — F.2d — (2d Cir., Slip op. 4161; June 14, 1976), this Court refrained from holding a similar "rehabilitative" statute unconstitutional, even where a defendant could be confined for a far greater period of time that he could be pursuant to the statute under which he was convicted.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
July 14, 1976

Respectfully submitted,

DAVID G. TRAGER,
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COUNTY OF KINGS
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LYDIA FERNANDEZ, being duly sworn, says that on the ~~14th~~ day of July, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the Brief for Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

David J. Gottlieb, Esq.
The Legal Aid Society
~~Federal Defender Services~~ Unit
509 United States Court House
~~Foley Square, New York, N. Y.~~ 10007

Sworn to before me this
14th day of July, 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 1977

Lydia Fernandez

LYDIA FERNANDEZ